



Federal Communications Commission
Washington, D.C. 20554

September 30, 2010

DA 10-1889

Wayne D. Johnsen, Esquire
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006

Re: DTV Norwich, LLC, licensee of MVDDS license WQBD526, MVD001-New York;
ULS File No. 0004353040

Dear Mr. Johnsen:

On August 13, 2010, DTV Norwich, LLC (DTVN) filed a Further Request for Waiver and Extension of Divestiture Deadline (*Seventh Request*) of Section 101.1412(g)(4) of the Commission's Rules with respect to call sign WQBD526, MVD001-New York.¹ For the reasons set forth below, we grant DTVN's *Seventh Request*.

Background. DTVN is the licensee of 45 Multichannel Video Distribution and Data Service (MVDDS) licenses including the above-referenced license for the New York service area. Cablevision Systems Corporation (Cablevision) holds an attributable interest in DTVN that is impermissible under Section 101.1412(a) of the Commission's Rules² because Cablevision operates a cable system with a service area that significantly overlaps the license area of DTVN's New York MVDDS license.³ However, Section 101.1412(g) provides that an entity that would otherwise be barred from acquiring an attributable interest in an MVDDS license by the cross-ownership restriction of Section 101.1412(a) may be a party to an MVDDS application pursuant to the divestiture procedures specified in the rule.⁴ Moreover, if the applicant is otherwise qualified, the application will be granted subject to a condition that the applicant shall come into compliance with the eligibility restriction within 90 days of the final grant of the license.⁵ The purpose of the MVDDS/cable cross-ownership rule is to prevent cable operators from precluding the entry of new Multichannel Video Program Distributors (MVPDs) and thereby limiting competition in the MVPD marketplace.⁶

¹ Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, ULS File No. 0004353040 (*Seventh Request*) at 1 citing 47 C.F.R. § 101.1412.

² 47 C.F.R. § 101.1412(a).

³ Under Section 101.1412(e), "significant overlap" occurs when a cable operator's subscribers in the MVDDS license area make up 35 percent or more of the Multichannel Video Program Distributor (MVPD) households in that MVDDS license area. 47 C.F.R. § 101.1412(e). *See also Seventh Request* at 2, n.5, citing FCC Form 602, Ownership Disclosure Report, Indirect Disclosable Interest Holders, ULS Ownership File No. 0003948680 (describing Cablevision's 90 percent indirect interest in DTVN).

⁴ 47 C.F.R. § 101.1412(g).

⁵ 47 C.F.R. § 101.1412(g)(4).

⁶ Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide a Fixed Service in the 12.2-12.7 GHz Band, ET Docket No. 98-206, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, 9679-80 ¶ 164 (2002) (*MVDDS Second R&O*).

On September 23, 2004, the Broadband Division (Division), Wireless Telecommunications Bureau, granted DTVN the above-referenced license for the New York service area subject to the condition that DTVN “shall come into compliance with 47 C.F.R. § 101.1412(a) [the MVDDS/cable cross-ownership limits] within three hundred and sixty (360) days of the final grant of this authorization (MVD001).”⁷ The Division granted this conditional authorization in response to DTVN’s first request for waiver to extend the 90-day deadline to comply with the cross-ownership rule by 270 days to allow Cablevision time to spin off its direct broadcast satellite (DBS) assets, including its interest in DTVN, to its shareholders as a new company.⁸ The spin off described in the *First Request* did not occur as planned and DTVN subsequently filed five successive requests for 360-day extensions.⁹ The Division granted each request¹⁰ after concluding that each extension would encourage DTVN to continue its efforts to foster the development of MVDDS, especially considering the lack of MVDDS equipment in the market, and would serve the purpose of the cross-ownership rule by promoting competition.¹¹

In the *Seventh Request* now before us, DTVN states that it has continued to move forward with planning and preparation for the initiation of MVDDS operations.¹² DTVN states that it has continued to conduct trials designed to confirm the technical feasibility of providing different types of MVDDS service and to develop the equipment needed to provide these services.¹³ DTVN states that, although its technical trials have provided significant feedback regarding the technical viability of the service, MVDDS equipment is still not commercially available and, to DTVN’s knowledge, no MVDDS licensee has commenced commercial operations.¹⁴ DTVN explains that its trials have provided valuable information which DTVN is using to determine the best configurations for deploying MVDDS services to consumers.¹⁵ Based on its trials, DTVN explains that it is taking steps to improve system performance

⁷ DTV Norwich, LLC, Application for Multichannel Video Distribution and Data Service License, MVD001, ULS File No. 0001618606-MVD001-New York, Request for Waiver and Extension of Divestiture Deadline of Section 101.1412(g)(4) of the Commission’s Rules, *Order*, 19 FCC Rcd 18701, 18707 ¶ (WTB, BD 2004) (*2004 Order*).

⁸ Request for Waiver and Extension of Divestiture Deadline of DTV Norwich, LLC, ULS File No. 0001618606-MVD001 (filed on June 10, 2004) (*First Request*). Following the then-planned spin-off, and with ownership of Cablevision’s cable and other assets resolved, DTVN expected to take such additional steps as might be necessary to address the MVDDS/cable cross-ownership limit with respect to the New York market. *See, e.g.*, Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on August 17, 2005 at 4-6 (*Second Request*).

⁹ *See Second Request* at 5. *See also* Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on September 18, 2006 (*Third Request*); Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on September 7, 2007 (*Fourth Request*); Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on September 5, 2008 (*Fifth Request*); Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on June 23, 2009 (*Sixth Request*).

¹⁰ *See* Letter to James R. Bayes, Esq., from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau, dated October 13, 2005 (*2005 Letter*); Letter to Wayne D. Johnsen, Esq., from Joel D. Taubenblatt, Chief, Broadband Division, WTB, dated October 18, 2006 (*2006 Letter*); Letter to Wayne D. Johnsen, Esq., from John J. Schauble, Deputy Chief, Broadband Division, WTB, dated October 5, 2007 (*2007 Letter*); Letter to Wayne D. Johnsen, Esq., from Blaise A. Scinto, Chief, Broadband Division, WTB, dated October 14, 2008 (*2008 Letter*); Letter to Wayne D. Johnsen, Esq., from Blaise A. Scinto, Chief, Broadband Division, WTB, dated October 7, 2009 (*2009 Letter*).

¹¹ *See, e.g.*, *2007 Letter* at 4; *2005 Letter* at 3-4.

¹² *Seventh Request* at 5-6.

¹³ *Seventh Request* at 5-6. DTVN notes that it has invested more than \$10 million to confirm the technical feasibility of MVDDS service. *Seventh Request* at 6.

¹⁴ *Seventh Request* at 5.

¹⁵ *Seventh Request* at 6.

Wayne D. Johnsen, Esquire
September 30, 2010

and has been working with multiple equipment suppliers to develop additional MVDDS equipment options.¹⁶ In addition, DTVN notes that it recently entered into an agreement, involving two of its Florida MVDDS licenses, designed to expedite the introduction and commercial feasibility of MVDDS service.¹⁷ DTVN expects that the market-wide deployment in these two markets will provide valuable information that will lead to further deployment of MVDDS services.¹⁸ DTVN therefore argues that although it has continued to make progress towards developing the 12 GHz equipment and service configurations needed to successfully deploy wireless broadband, video, voice, and data services to businesses and consumers, additional time is still needed.¹⁹ DTVN also contends that regulatory uncertainty surrounding MVDDS licenses hindered commercial MVDDS development, which in turn hindered DTVN's ability to determine which course of action to follow with respect to achieving compliance with the Commission's cable/MVDDS divestiture rule.²⁰

DTVN argues that given the current state of the MVDDS marketplace, granting this further extension of time will not preclude entry or limit competition in the New York market and that an extension would also create demonstrable public benefits.²¹ DTVN states that although it may ultimately seek to achieve compliance by, for example, partitioning its New York MVDDS license, such an approach may not be the best compliance option once it is determined how best to deploy MVDDS service.²² Thus, grant of the requested extension, DTVN believes, will benefit the public by facilitating the efficient and effective long-term deployment of MVDDS services.²³

For these reasons, DTVN requests an extension through the end of the current license term to achieve compliance with the cable/MVDDS cross-ownership limits with respect to the New York market.²⁴ On August 25, 2010, the Division issued a Public Notice seeking comment on the *Seventh*

¹⁶ *Seventh Request* at 6.

¹⁷ DTVN Comments at 2-3 citing FCC Form 608, Application or Notification for Spectrum Leasing Arrangement, ULS File No. 0004347931 (DTVN recently entered into a lease, involving two of its MVDDS licenses in Florida, under which ProCapital Communications, L.L.C. (ProCap) intends to provide MVDDS services using frequencies associated with the two licenses). "ProCap . . . will be able to build upon the expertise DTVN already has developed in confirming the technical feasibility of MVDDS services." See ULS File No. 0004347931 (Description of Transaction and Public Interest Statement).

¹⁸ DTVN Comments at 3.

¹⁹ *Seventh Request* at 3.

²⁰ See *Seventh Request* at 3-5 citing DTV Norwich, LLC Petition for Waiver and Extension of Time to Comply With the Commission's MVDDS Substantial Service Requirements in Section 101.1413, ULS File Nos. 0003516339 *et al.*, at 12-13 (July 25, 2008). DTVN notes that virtually all MVDDS licensees filed similar requests for waiver and extension and that virtually all MVDDS licenses were in regulatory limbo until the Commission granted the requests. See *Seventh Request* at 4 citing In the Matter of Requests of Ten Licensees of 191 Licenses in the Multichannel Video and Data Distribution Service for Waiver of the Five-Year Deadline for Providing Substantial Service, File Nos. 0003516339 *et. al.*, Order, DA 10-1378 (rel. July 28, 2010).

²¹ *Seventh Request* at 6-7.

²² *Seventh Request* at 7.

²³ *Seventh Request* at 7.

²⁴ See *Seventh Request* at 1; DTVN Comments at 1. In the alternative, DTVN requests that, if the Commission decides not to grant a waiver extension through the end of the current license term, it be granted an additional 360-day extension. *Seventh Request* at 6 n.19.

Wayne D. Johnsen, Esquire
September 30, 2010

*Request.*²⁵ Comments were due on September 15, 2010. Reply Comments were due on September 22, 2010. In response, we received only one comment, filed by DTVN, supporting grant of its request.

Discussion. Section 1.925(b)(3) of the Commission's rules permits us to grant a request for waiver if it is shown that: (i) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²⁶

We find that granting DTVN's *Seventh Request* is warranted under 47 C.F.R. § 1.925(b)(3)(i). The purpose of the MVDDS/cable cross-ownership rule is to prevent cable operators from precluding market entry by new MVPD providers thereby limiting competition in the MVPD marketplace. Since commercial MVDDS equipment is not available and no one has yet commercially deployed MVDDS elsewhere in the United States, we conclude that granting the request will not preclude entry or limit competition in the New York market. In addition, DTVN indicates that it continues to work to foster the development of MVDDS and to work to deploy the service.²⁷ In light of these efforts to foster the development of MVDDS, which may be particularly important given that MVDDS equipment is still under development,²⁸ we find that an extension of DTVN's deadline to comply with the Commission's MVDDS/cable cross ownership rule will serve the purpose of the rule by promoting competition and therefore is in the public interest. We note in this regard that there was no opposition to DTVN's request.²⁹ Because we find that extending DTVN's deadline is warranted under 47 C.F.R. § 1.925(b)(3)(i), we need not address whether DTVN's request meets the requirements of 47 C.F.R. § 1.925(b)(3)(ii).

Accordingly, IT IS ORDERED that, pursuant to the authority in sections 1, 2, 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i) and 154(j), and Section 1.925(a) of the Commission's Rules, 47 C.F.R. § 1.925(a), the Further Request for Waiver and Extension of Divestiture Deadline filed by DTV Norwich, LLC, on August 13, 2010, ULS File No. 0004353040, IS GRANTED to the extent indicated herein.

IT IS FURTHER ORDERED that the first three SPECIAL CONDITIONS appearing on the license, call sign WQBD526, MVD001-New York shall be modified in accordance with this ruling to read as follows:

- DTV Norwich LLC shall come into compliance with 47 C.F.R. § 101.1412(a) [the MVDDS/cable cross-ownership limits] by September 23, 2014, *i.e.*, the end of the initial license term.
- Failure to satisfy this condition shall result in automatic cancellation of this license, whereupon the Commission shall retain all monies paid to the Commission and, based on the facts presented, shall take any other action it may deem appropriate. *See generally* 47 C.F.R. § 101.1412(g)(6).

²⁵ *Public Notice*, WTB Seeks Comment on Request of DTV Norwich, LLC for Waiver and Extension of Divestiture Deadline for New York Multichannel Video Distribution and Data Service License, DA 10-1606 (rel. Aug. 25, 2010).

²⁶ 47 C.F.R. § 1.925(b)(3); *see also* 47 C.F.R. § 101.23.

²⁷ *See Seventh Request* at 5-6; DTVN Comments at 2-3.

²⁸ *See* note 15, *supra* and accompanying text. We also note that, although in full force and effect, the MVDDS service rules did not become final, *i.e.*, no longer subject to judicial review, until 2005. *See Northpoint Technology, Ltd. v. FCC*, 414 F.3d 61 (D.C. Cir. 2005).

²⁹ We further note that there has been no opposition to any of DTVN's previous extension requests.

Wayne D. Johnsen, Esquire
September 30, 2010

- This authorization is granted to DTV Norwich pursuant to *Order*, 19 FCC Rcd 18701, 18707 (WTB, BD 2004). *See also* Letter to James R. Bayes, Esq., from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau, dated October 13, 2005, Letter to Wayne D. Johnsen, Esq., from Joel D. Taubenblatt, Chief, Broadband Division, WTB, dated October 18, 2006; Letter to Wayne D. Johnsen, Esq., from John J. Schauble, Deputy Chief, Broadband Division, WTB, dated October 5, 2007; Letter to Wayne D. Johnsen, Esq., from Blaise A. Scinto, Chief, Broadband Division, WTB, dated October 14, 2008; Letter to Wayne D. Johnsen, Esq., from Blaise A. Scinto, Chief, Broadband Division, WTB, DA 09-2182 (rel. October 7, 2009); Letter to Wayne D. Johnsen, Esq., from Blaise A. Scinto, Chief, Broadband Division, WTB, DA 10-1889 (rel. September 30, 2010).

This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Blaise A. Scinto
Chief, Broadband Division,
Wireless Telecommunication Bureau